Supreme Court of the Hawaiian Islands--In Banco. April Term, 1886.

MARK P. ROBINSON vs. L. G. SRESOVICH, J. M. GRAY AND R. LEVEY: LYONS AND LEVEY GARNISHEE.

BEFORE JUDD C. J. AND M'CULLY AND PRESTON J. J.

Opinion of the Court per JUDD C. J.

This is an action of assumpsit to recover the sum of $900, for price of certain bananas, sold and shipped by plaintiff to defendants in San Francisco.

The verdict of the Jury was for plaintiff for amount claimed with interest. The case comes to us by exceptions of the defendants as follows:

I. "The defendents excepted to the admission in evidence of certain receipts for the bananas, shipped per steamer, to R. Levey, San Francisco, signed in Honolulu by one Henry Davis on the ground that there was not sufficient evidence that Davis was defendants' agent." It was an important question of fact in the case, for the jury to pass upon, whether Davis was the agent of defendants; for if he, as their agent accepted the bananas, they would be held liable.

Upon this there was much evidence adduced by plaintiff. But, as it was left to the jury to say whether they were satisfied from the evidence that Davis was defendants' agent, his receipts in this capacity were admissible, otherwise the evi dence of his agency would be without final effect.

II. The Court was requested, by defendants' counsel, to charge: "If the jury find that the plaintiff consigned to defendants the bananas, the price of which this action is brought to recover, and that there was no obligation under the contract, for defendants to receive them, then those shipments were made at the exclusive risk of the plaintiff."

The Court could not, in view of the evidence adduced, justly charge in the terms as requested, for as above intimated, there was evidence tending to show that the bananas, for the price of which this action was brought, were accepted and received from plaintiff in Honolulu, by defendants' agent, and by him shipped to defendants, in the same invoice with bananas procured from other sources, and both lots were intermingled and taken to defendants' store in San Francisco, and sold indiscriminately; so it was impossible to say what the bananas from plaintiff realized. The Court properly charged, that, under such circumstances, if the jury found that that the plaintiff's bananas were good marketable bananas, properly packed, the defendants were liable for the highest price obtained for any of the lot.

III. The Court was requested to charge: "If the jury finds, that defendants exercised reasonable care in the preservation and disposal of those (plaintiff's) bananas, and that no more was realized from the sale thereof than is stated in the accounts rendered by defendants to plaintiff, they must find for defendants." The Court charged, that, "if the jury found that defendants took the same care of plaintiff's bananas, that they did of other bananas, and took the same care to obtain the best price, and that the price they obtained was the best that could be obtained, then they must find for defendants." We think the Court was right, especially in view of the charge already given above.

If defendants had mingled plaintiff's goods with their own, so that they could not be distinguished, they were bound to exercise the same care in their preservation and disposition, as they exercised toward their own goods.

This would hold them to a greater degree of care than merely reasonable care.

The fourth request was as follows: "If the jury find from the evidence that deceit was practised upon defendants in the shipments of bananas they will find for the defendants."

This the Court declined, as no evidence had gone to the jury tending to show that any deceit had been practiced. This was right. "A Court may properly decline to give instructions to a jury, when the question upon which the instructions are desired, is not raised by the evidence." Wendell and Moulton, 26 N. H., 41. It is not erroneous in a Judge, to decline instructing the jury in the manner requested by either party, when the instructions prayed for, are not founded in the evidence, or not applicable to the case. Drake vs. Curtis, 1 Cush. 395: "A party has no occasion, and no right to frame an hypothesis not founded in the evidence, and to ask for the instructions of the Court, upon such a state of things." Rice vs. Porter 17, N. H. 137.

The counsel for defendants, also except to the charge of the Court, in saying in substance, "that there was no evidence, on what date the different consignments were sold, nor the names of the persons to whom they were sold; and, as one of the witnesses testified that he saw the bananas in defendants' store, one week after their arrival, the jury might fairly draw the inference, that the defendant may have sold them to himself." It is not indicated to us in what manner this observation of the Court was not a fair comment on the evidence. If it be true, as testified to by one of defendants' witnesses, that the bananas were seen by him in defendents' store one week after their arrival, and he sold them indiscriminately, with his own bananas, to purchasers, in small lots, keeping no separate account of what the plaintiff's bananas brought, this transaction would amount to taking plaintiff's goods over to himself, and he would thus be accountable for the highest price he obtained for any. This is but a repetition of exception III considered above.

Exceptions overruled.

F. M. Hatch for plaintiff; P. Neumann and W. A. Whiting for defendants.

Honolulu, June 8, 1886.

Subsequently to the signing of the foregoing decision, counsel for the defendants filed a brief, which they requested the Court to consider previous to filing its opinion.

We have carefully considered such brief and the arguments and authorities cited, but see no reason to alter the decision before arrived at.

Honolulu, September 16, 1886.

Supreme Court of the Hawaiian Islands.—In Banco. October Term, 1886.

PUHI (K) vs. MAHULUA (W).

BEFORE JUDD, C. J., M'CULLY AND PRESTON, J. J.

Opinion of the Court by M'CULLY, J.

We take the opinion of the Chief Justice, who heard this case, and from whose decree this appeal is made, for the opinion of the Court, hereby affirming the said decree, and refer, for the statement of the case and the analysis and *resume* of the evidence, to that opinion.

We have carefully examined the evidence, as taken by the Clerk, and consider it in connection with the argument made before us.

In the conflict between the plaintiff's and the defendant's witnesses, we prefer to give credit to the latter.

Their testimony is characterized by statements of circumstances which are particular and probable, consistent and unlikely to be invented.

The conveyance to this defendant, for a small or a nominal consideration, was well supported and reasonable. The allegation of undue influence is without proof.

The decree is affirmed.

A. Rosa for plaintiff; W. A. Kinney for defendant.

Honolulu, October 23, 1886.

Supreme Court of the Hawaiian Islands--In Banco. October Term, 1886.

KALUA (W.) VS. S. SELIG, ADMINISTRATOR OF ESTATE OF AHUNA DECEASED.

BEFORE JUDD C. J. M'CULLY AND PRESTON J. J.

Opinion by M'CULLY J.

Assumpsit—verdict for the plaintiff.

Upon exceptions to the verdict, as against the law and the evidence, and motion for a new trial, the Chief Justice holding the term, ordered a new trial. The plaintiff's bill of exceptions to this order, setting forth the evidence given in the case, and the instructions in law given to the jury, is the matter before the Court.

The evidence shows that Ahuna, at a date in 1884, went to the mother of the plaintiff, then a girl of fifteen, attending school. In the evidence given by the girl and her mother, the phraseology used, is that, Ahuna wished to engage her to do household and housekeeping work, such as cooking, washing, sweeping rooms, making beds, sewing. The girl and her mother assented and shortly after went to the residence of Ahuna. The mother at that time remained five days, lodging at Ahuna's, occupying a bedroom by herself. The plaintiff, the first night, cohabited with Ahuna, and continued this cohabitation, for the two years, up to the day of his death. There is no evidence showing that she objected to this in the beginning or at any time afterwards. There is no evidence that she was coerced or was deceived.

She testifies that Ahuna engaged her for a long time; "he didn't mention the number of years; he said I was to live a number of years with him. My mother was paid for Ahuna's injuring me, when I came to live with him, one hundred dollars."

The force of the whole evidence is, that she voluntarily did what her mother, with herself, had bargained that she should do, became Ahuna's mistress.

That she did become his mistress, and lived in that character, bearing him one child in his lifetime, is we believe not contested by the plaintiff.

There is a conflict of testimony as to the amount of labor which she performed. The weight of testimony in our view, supports that she did not sustain the character and do the work of a servant; she merely did what the wife of Ahuna might have done.

Ahuna had no wife; the plaintiff was the only female on his premises; there were several men servants, including a cook.

The contention of the learned counsel for the plaintiff, is that there was a *bona fide* contract for labor service merely, and that the service was performed, and that Ahuna (and his estate) could not be relieved from his assumpsit by the after seduction of the girl.

The proposition of law is right and is not disputed. If the agreement of the girl did not originally contemplate her becoming Ahuna's mistress, but was for proper domestic service, and such service was performed, a subsequent seduction would not bar the right to recover wages. So the Court charged the jury, that "a contract will not be avoided, because it may, by any probability, facilitate an illegal transaction. To render it void the connection with the illegal transaction must be direct, and not remote or conjectural, but the other services cannot cover up the fornication, if the substantial agreement was to live with him as a mistress."

The verdict of the jury was contrary to the law and the evidence, unless it appeared that there was a contract for service clear of the immoral bargain

The jury was properly instructed that they could not in this action give the plaintiff a verdict in compensation for seduction.

In view of the evidence given it is apparent that the jury disregarded the instructions.

There was no credible and sufficient evidence to support a verdict upon the only ground on which it could be given.

It is transparent from the evidence of the plaintiff herself, that the original bargain was for her person, and we should stultify ourselves to find any other conclusion from the euphemistic language of the plaintiff, or from the employment she occupied herself with.

We are of opinion that the trial Justice might properly have ordered, if asked, judgment *non obstante veredicto*.

Upon the same state of facts the same result must follow again, but the form of our judgment must be, that the exceptions are overruled, verdict set aside, and a new trial is ordered.

It is due to the learned Justice who presided at the trial, to say that the defendant, desirous of closing the account of the estate, and of getting the verdict of a jury on this claim, waived the objection to a minor's sueing for wages.

Paul Neumann and W. A. Kinney for plaintiff; S. B. Dole for defendant.

Honolulu, October 20, 1886.